United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1173

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1173

UNITED STATES OF AMERICA

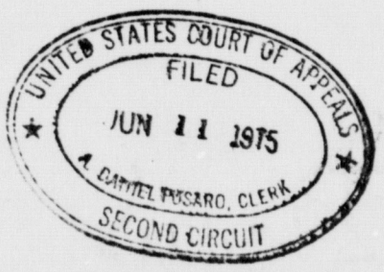
-against-

FRANK LICURSI, JR.,

Defendant-Appellant

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF APPELLANT



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1. Did not the Trial Court Err in denying appellant's motion for a judgment of acquittal at the close of the Government's evidence and again at the close of all the evidence and in denying appellant's motion for judgment of acquittal notwithstanding verdict of guilty?

2. Did not the Trial Court Err in refusing to charge the jury with the defense of Entrapment, as requested by the appellant?

PRELIMINARY STATEMENT

On or about the 27th day of November 1974 an indictment was returned in the Eastern District of New York against the defendant FRANK LICURSI JR. and 3 co-defendants (74 CR 743).

The indictment, consisting of one count stated that " on or about the 5th day of May 1974, within the Eastern District of New York," one of the other defendants"knowingly and intentionally aided and abetted by," two other defendants and appellant FRANK LICURSI JR., "did knowingly and intentionally distribute approximately eighty-nine (89) grams of cocaine hydrocholride, a schedule II narcotic drug controlled substance (Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2.)"

Appellant, FRANK LICURSI JR., was found guilty after a jury trial and was given the following sentence: "3 years. Execution of sentence is suspended and the defendant is placed on probation for a period of 3 years pursuant to Title 18, U.S.C. sec. 5010(a) and to pay a fine of $500.00 pursuant to Title 18 U.S.C. sec 4209; fine to be paid within one year.

Appellant appeals from the District Court's Judgment of conviction and sentence.

STATEMENT OF THE CASE

FRANK LICURSI JR., defendant-appellant was indicted on 27th day of November 1974 on a one court bill of indictment as stated in detail in the preliminary statement. FRANK LICURSI, Jr., pleaded not guilty at his arraignment on December 10, 1974. Trial was held on February 24, 25 and 26, 1975 before the Honorable Mark A. Costantino of the District Court for the Eastern District of New York sitting with a jury. A motion for judgment of acquittal was denied at the conclusion of the government's case and at the conclusion of the trial. FRANK LICURSI, Jr. was found guilty of the one count charge. A motion for judgment of acquittal notwithstanding the verdict was made after the verdict which was denied by the Court. On April 18, 1975 FRANK LICURSI JR. was sentenced to a term of three years, which was suspended and he was placed on probation for a period of three years pursuant to Title 18 USC sec. 5010(a) and to pay a fine of $500.00 within one year pursuant to Title 18 USC sec. 4209.

FRANK LICURSI JR. an apprentice electrician (Tr. p. 123), twenty three years of age and separated from his wife, was living in an apartment in a private house at 1-43 Plaza Road, Fairlawn New Jersey. Appellant does not have a narcotics habit. He had never bought or sold narcotices in his life and had no prior criminal record of any kind (Tr. p. 157). Appellant had an acquaintance named John DiJanni, who he met through a girl named Jennifer Lisa (appellant's girl friend). John DiJanni was an insurance salesman (Tr. p. 125) and had sold some insurance to Miss Lisa. Appellant

had first met Mr. DiJanni "about a year ago" (Tr. p. 125) i.e. February of 1974. DiJanni had gone to high school with Miss Lisa (Tr. p. 125). On "Monday or Tuesday" before May 5, 1974 (Tr. p. 129) appellant received a phone call from John DiJanni. John DiJanni unbeknownst to appellant was under indictment at that time in the United States District Court in New Jersey for conspiracy to sell narcotics and was at that time cooperating with the Government (Tr. p. 72). The Government at the time it enlisted the cooperation of DiJanni did not know of the business connection between appellant's girl friend Miss Lisa and DiJanni (Tr. p. 81). DiJanni asked appellant during that telephone conversation if "he had any cocaine, any coke" (Tr. p. 126). The appellant tells him "I didn't" (Tr. p. 126). DiJanni says to appellant that " a friend of his was interested " (Tr. p. 126). Appellant does not believe that DiJanni mentioned specific amount of coke (Tr. p. 117). Nor did DiJanni mention price "at that time" . Appellant said to DiJanni that "he wasn't dealing in coke" and that "I ~~didn't~~ hadn't known anybody who had coke" (Tr. p. 127). That telephone conversation was not monitored by the Government (Tr. p. 87). Appellant had been attending apprentice Electrician School on tuesdays and thursday for the past five years (Tr. p. 123) and he became acquainted with Eugene Caufild, one of the defendants "for approximately three years " (Tr. p. 129 and 130). Mr. Caufield had mentioned to appellant "during one of the Tuesday or Thurday sessions " that he was "able to get coke"(Tr. p. 129) Appellant tells Caufield "I am not interested" (Tr. p. 130). This conversation

came before the phone conversation had with DiJanni (p. 129). After appellant's phone conversation with DiJanni, he goes to electricial apprentice school on the Tuesday following the phone conversation and appellant mentions to Mr. Caufield that "Mr. DiJanni called me [redacted] told me a friend of his was interested in buying coke" (Tr. p. 131). The following Friday, appellant receives a phone call from DiJanni and renews his inquiry "If I could get coke" (Tr. p. 132). Appellant states to DiJanni " that a friend of mine".. " said he had coke" (Tr. p. 132). DiJanni asks appellant if he, DiJanni, could "bring his friend over to" appellant's apartment. (Tr. p. 132). Appellant relates that information to Mr. Caufield (Tr. p. 132). Caufield was coming to the apartment of appellant anyhow (Tr. p. 170). A meeting takes place on May 5, 1974 at around 7:00P.M. Present at the meeting is Caufild, Phillis (Caufield's wife), Jennifer Lisa (appellant's girl friend), appellant, DiJanni and the government agent Brzostowski (Tr. p. 136). There were no narcotics seen by anyone in the apartment (Tr. p. 137). Appellant took part in a"general conversation" (Tr. p. 137) Appellant did not at any time use the word "coke" or "cocaine". Caufield announces that "we are going to Brooklyn" (Tr. p. 139). Caufield asks appellant to "take his wife over to Brooklyn" , since they had come over on Caufield's motorcycle and it was cold that night(Tr. p. 140). Appellant states that he couldn't hear the conversation between the agent and Caufield (Tr. P. 138) but he believes that Caufield and the agent used the word"coke" (Tr. p. 140).

The appellant, Jennifer, Phillis get into appellant's automobile. The agent gets into his automobile and Caufield gets onto his motorcycle (T . p. 141) "apparently" leading the way" to Brooklyn (Tr. p. 145). The agent leaves the group in New Jersey (Tr. p. 145). Appellant, Phillis, Jennifer and Caufield proceed to Brooklyn (Tr. p. 145). They proceed to an apartment in Brooklyn (Tr. p. 146). While at the apartment "Caufield places a call" (Tr. p. 148). Then Caufield receives a call (Tr. p. 152). Appellant states "everybody here is pananoid" when he picks up the receiver and speaks to the agent on the other end (Tr. p. 153). Latter that evening Jennifer and the appellant go back to New Jersey. The next time defendant sees defendant at the electrician apprentice class (the following tuesday) Caufield states to appellant "Brzostowski settled their deal" (Tr. p. 156). Caufield did sell narcotics to government agent on May 6, 1975 (Tr. p. 64). The appellant was not present at the time of the sale (Tr. p. 96) nor did he know that the sale was going to take place. The appellant derived no benefit or gain , pecurniany or otherwise, either directly or indirectly from this sale, and in fact had no interest in whether or not it took place. (Tr. p. 100, 155, and 157).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S EVIDENCE AND AGAIN AT THE CLOSE OF ALL THE EVIDENCE AND IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING VERDICT OF GUILTY SINCE UNDER THE FACTS NO CRIME WAS COMMITTED BY THE APPELLANT

Essentially, the question in this case is whether FRANK LICURSI, JR., the defendant-appellant is a principal within the meaning of Section 2(a) of Title 18 USCA. Section 2(a) reads as follows:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Although it has been said that there are no common law offenses against the United States, the aforementioned section has been interpreted in light of common law notions of what constitutes a party to a crime. Judge Learned Hand set the pattern for interpretation of this section in United States v. Peoni, 100 F. 2nd 401, 402 (2nd Cir. 1938). After reviewing the common law authorities on this subject the Court concluded:

> "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed."

This principal was followed and applied in United States v. Moses, 220 F.2d 166 (3rd Cir. 1955), a case in point. In Moses two undercover agents approached the appellant at her apartment and inquired about the possiblity of purchasing drugs. She indicated that she did not have any, but that her supplier would soon be there and she would arrange for the agents to get the drugs from him. When the supplier arrived the appellant introduced the agents and said that they were "all right". Sometime thereafter, with the appellant not present, the sale of the drugs was consummated. The Court reversed the conviction for aiding and abetting the sale, stating at 220 F. 2d. at page 168 as follows:

> "There was nothing to show that she(appellant) was associated in any way with the interprise of the seller or that she had any personal or financial interest in bringing trade to him. Although appellant's conduct was prefatory to the sale, it was not collaborative with the seller.

Morei v. United States, 127 F. 2d 827 (6th Cir. 1942) is also in point. Dr. Platt was convicted of the unlawful sale of narcotices under the same sections applicable to the instant case. The evidence disclosed that Dr. Platt gave a government agent the name and address of a seller of narcotics. In addition, Dr. Platt told the agent to inform the seller, an old friend of his, that the doctor had sent the agent and that he should "take care of" the agent. The agent gave the seller the Doctor's prescription

blank (page. 832) with the seller's name (p. 832) and the doctor's name written thereon (p. 833). The court, in reversing the conviction held that since the doctor had no agreement or understanding with the seller nor community of scheme, since they shared no common intent nor was there any concert of action and further that the doctor was to receive no remuneration and expected none; there was no purposive association with the sale such as would make him a principal. The Court, in declaring that Dr. Platt had committed no crime stated at page 831:

> "Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of immoral intention between him and the perpetrator of the crime. The concept of an accessory before the fact presupposes a pre-arrangement to do the act..."

It is clear from the above cases that in order to aid or abet the commission of a crime it is necessary that the defendant act together with the principal in bringing about the illegal transaction. There must be that common intent, that understanding, that together they will seek to make the criminal venture succeed.

> "Generally speaking, to find one guilty as a principal on the ground that he was an aider and abetter, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act was committed. "Johnson v. United States, 195 F. 2d 673, 675 (8th Cir., 1952).

In the case at hand there is no evidence from which a jury could infer that FRANK LICURSI JR. shared with the seller a common intent to bring about the sale of narcotics. After the

arrival of the agent and the informer at the apartment of the appellant, there was no conversation between Mr. Licursi and the seller to indicate an arrangement with the seller to sell drugs to the agents. Licursi received no remuneration and expected none. The seller was coming to appellant's apartment anyhow and not specifically to meet the agent. Far from seeking to bring about the sale, appellant had no interest in whether or not it was actually consummated. In brief, none of his conduct manifested a common intent with the seller to bring about a sale, and the cases make clear that in order to sustain a conviction the government must show he acted with the seller. Appellant had seen the seller continuously for about three years at electrician apprentice school on tuesday and thursday nights. Appellant did not actively seek out neither the buyer nor the seller. Appellant did nothing affirmately after the sale to indicate interest in the transaction, and as a matter of fact did not know that the actual transaction had taken place.

For the reasons recited in the cases cited, it is respectfully submitted that appellant's motion for judgment of acquittal should should have been granted by the Court below.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY WITH THE DEFENSE OF ENTRAPMENT SINCE THE GOVERNMENT"S CASE WAS NOT FREE OF ENTRAPMENT

One of the leading cases on the law of entrapment is Sorrells v. United States, 287 U.S. 435 (1932). In that case a

prohibition agent went to the defendant's home, accompanied by three residents who knew the defendant well. The agent asked the defendant if he could get him some liquor. Defendant stated that he did not have any. The agent made a second request without result. On the third request, defendant left his home and after a few minutes came back with half gallon of liquor. The agent testified that he was the first and only person among those present at the time who said anything about securing liquor, and that his purpose was to prosecute the defendant for procuring and selling it. To support this testimony, the Government called three witnesses who testified that the defendant had the general reputation of rum runner. There was no evidence, however, that the defendant had ever sold any intoxicating liquor prior to the transaction in question.

The Court held that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the agent, that it was the creature of his purpose, and that the defendant had no previous disposition to commit it, also that the agent lured the defendant, otherwise innocent, to its commission by repeated and persistent solicitation (p. 441).

The facts in the case at hand can be favorably compared to the facts in case of Sorrells above cited. In the instant case Joseph Brzostowski, the government agent and John DiJanni, the informer for the Government, instigated the crimes herein, if any, by soliciting appellant two times to obtain narcotics. DiJanni had sold insurance to appellant's girl friend and had gone to high school with appellant's girl friend. Unbeknowst to the

appellant, DiJanni had pleaded guilty to conspiracy to sell narcotics and was awaiting sentencing and in order to make his cooperation known to the Court, agreed to solicit individuals to sell narcotic to the government agent. The evidence here shows that the crimes, if any, were the creature of the government agent, and the informer, DiJanni and that they lured the appellant, otherwise innocent, into introducing the agent to the seller. The appellant, the evidence shows, had never bought or sold narcotice of any kind in his life. To condone the situation in the case at bar i.e. having a government agent involved in the prosecution of an individual under indictment for conspiracy to sell narcotics, suggest a plan to turn that individual into an informer with the promise of making that individual's cooperation known to the Court, who is going to sentence him, and the informer then goes ahead and solicits the appellant to introduce "his friend" the government agent to a person who turns out to be a seller of narcotics, where the informer had legitimate business relationship with appellant's girl friend is to implant the seeds of a potential crime in the mind of an otherwise innocent appellant.

In 1958, the Court in Sherman v. United States, 356 U.S. 369, again considered the theory underlying the entrapment defense and expressly reaffirmed the view expressed by the Sorrells majority. In Sherman the defendant was convicted of selling narcotics to a Government informer. As in Sorrells, it appears that the Government

agent gained the confidence of the defendant, and despite initial reluctance the defendant finally acceded to the repeated importunings of the agent to commit the criminal act. On the basis of Sorrells, the Court reversed the affirmance of the defendant's conviction.

The case of United States v. Russell , 411 U.S. 423 (1973), in which an undercover narcotics agent investigating respondent and his confederates for illictly manufacturing a drug, offered them an essential ingredient which was difficult to obtain, though legally available. The Court found no entrapment. The Court stated as follows at 411 U.S. page 374:

> "We decline to overule these cases (Sorrells and Sherman). Sorrells is a precedent of long standing that has already been once reexamined in Sherman and implicitly there reaffirmed.

The Court did not see in Russell either a Sorrells or Sherman situation and stated so as follows at 411 U.S. at page 376 :

> Respondent's concession in the Court of Appeals that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment.

In the case at hand there is no evidence that the appellant bought or sold narcotics at any time in his life and therefore had no predisposition to commit the any crime.

The Trial Court below refused appellant's request to charge the jury on the defense of entrapment. The charge requested by the appellant is as follows:

> The defendant Licursi asserts that he was the victim of entrapment as to the crime charged in the indictment.

> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment and the law as a matter of policy forbids his conviction in such a case. On the other hand, where a person already has the readiness and willingness to break the law, the fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the Government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to purchase narcotics from such suspected person. If then the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was afforded and that Government officers or their agents did no more than to offer the opportunity, then the jury should find that the defendant is not a victim of entrapment. On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant Licursi had the previous intent or purpose to commit any offense of the character here charged and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him. If the evidence in the case should leave you with a reasonable doubt whether the defendant Licursi had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty. Where the defendant Licursi's testimony clearly shows entrapment and the Government does not go forward with contradictory testimony then the defendant is entitled to acquittal.

The appellant's attorney in his opening statement informed the jury that the appellant was going to put forth the defense of entrapment. During the jury's deliberations it asked the following question in Court Exhibit B:

> "In his opening Statement the Defense Lawyer

mentioned Entrapment. Does Entrapment have any bearing on this case?

The Trial Court formulated the following response:

> "The answer to that question is no. And the reason being the raising of a defense of entrapment by an an attorney in his opening statement does not necessarily mean that it will be submitted to the jury. The question is one to be determined by the Court as a matter of law as to whether such a charge should be made to the jury. The Court after argument determined that it would not charge the jury as to the law of entrapment.

An exception was taken as to Trial's Court refusal to charge the law of entrapment.

The Government agent was perfectly justified in offering any inducement in order to encourage appellant to commit the crime. On the other hand FRANK LICURSI JR. not only had never sold drugs, but there were no reasonable grounds to believe that he had.

For these reasons it is respectfully submitted that the Trial Court Erred in refusing to charge the jury on the law of entrapment.

CONCLUSION

The appellant respectfully submits that a reversal with direction to enter a judgment of acquittal is warranted, for the reason that no crime was committed, and even assuming arguendo that a crime was committed, the government's case was not free of entrapment and therefore a reversal with direction for a new trial is warranted.

Respectfully submitted

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